IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

Northern Division

(5)

In re	:	
WAYNE J. MOORE	:	Bankruptcy No. B-79-00020
Bankrupt	:	
RUSSELL C. HARRIS, Trustee	:	
Plaintiff	:	
	:	MEMORANDUM DECISION AND ORDER
vs	:	
FEDERAL EMPLOYEES CREDIT UNION	:	
Defendant	:	

Timothy W. Blackburn represented the defendant, Federal Employees Credit Union. Russell C. Harris represented himself as trustee.

The bankrupt, Wayne J. Moore, pledged a 1967 Bronco as collateral for a loan at the Federal Employees Credit Union. The lien was properly noted on the certificate of title for the motor vehicle. The bankrupt paid off the loan, but did not have a clean certificate of title issued, apparently because he contemplated borrowing more money from the credit union. Subsequently he did borrow more money, but was not required to pledge the Bronco as security for this second loan. The lien noted on the certificate of title for the Bronco, however, was never signed off by the credit union. The bankrupt then became delinquent on the second loan, so the credit union filed suit to collect on the loan. A judgment was obtained, and a writ of execution was issued on June 29, 1978. The Bronco was executed upon by the sheriff and delivered to the credit union on November 15, 1978. On November 20, 1978, after the vehicle was delivered to the credit union, but before it was sold, the credit union was notified by the bankrupt's attorney of Mr. Moore's intention to file bankruptcy. The Bronco was then sold pursuant to the writ of execution on December 20, 1978. Mr. Moore thereafter filed bankruptcy on January 8, 1979.

The trustee in this case filed a complaint to have the above described transfer and sale of the Bronco on behalf of the credit union set aside under §60b, 11 U.S.C. §96b, as a preferential transfer. A trial was held on the matter on June 14, 1979 at which time the parties stipulated to the above stated facts. The Court ruled at that time that the notification by telephone to the credit union on November 20, 1978 of Mr. Moore's intention to file bankruptcy constituted notice of insolvency. There remains the question of whether the execution on the Bronco and its subsequent delivery to the credit union before the credit union had notice of bankrupt's insolvency constituted a transfer, as defined in §60a(2), 11 U.S.C. §96a(2), so as to prevent application of the §60b avoidance powers.

§60a(2), 11 U.S.C. §96a(2), defines a transfer of "property other than real property" as occurring when it becomes "so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee." If this "transfer" occurred before the notice of insolvency, it would not constitute a preferential transfer under §60a of the Act, 11 U.S.C. §96a, and therefore could not be avoided by the trustee under §60b, 11 U.S.C. §96b. Thus, whether the execution on the Bronco and its subsequent delivery to the credit union constitutes a transfer "so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee" is the pivotal issue.

The point at which a judicial lien becomes a "perfected" transfer for purposes of §60 of the Bankruptcy Act, 11 U.S.C §96, is governed by state law. See 3 Collier on Bankruptcy ¶¶60.39[2] and 60.46 (14th Ed. 1977). The Utah Supreme Court has decided a case analogous to the instant case in McIntosh v. Bank of Salt Lake, 24 Utah 2d 245, 469 P.2d 1016 (1970), which case is controlling.

In McIntosh, a bank filed an action on a promissory note more than four months before its maker filed bankruptcy. At the time

the action was filed, the bank also had a writ of attachment issued. Negotiations ensued and just prior to the commencement of the four month period, a settlement was reached. The bank released its writ of attachment a few days before the four month period began to run, and the bankrupt issued a check in return. However, the check was issued within four months before filing. After the bankruptcy was filed, the trustee brought an action to set aside the transfer as a preferential transfer under §60 of the Act, 11 U.S.C. §96. The Court held that the service of the writ of attachment created a valid lien, or "transfer," prior to the four month period, and that the payment of the check which came within the four month period was merely a formality to conclude the settlement made pursuant to the valid "transfer."

The principles of the McIntosh decision may be applied to the instant case. The execution of the writ by the sheriff and the delivery of the Bronco to the credit union prior to the knowledge of insolvency created a valid lien, or "transfer," as defined in §60a(2), 11 U.S.C. §96a(2). The fact that the formality of a sale was not carried out until after notice of insolvency does not bring this transfer of property within §60b, 11 U.S.C. §96b, for the "transfer" as defined in §60a(2), 11 U.S.C. §96a(2), was accomplished at the time the property was executed on and possession was delivered.

The conclusion of this Court and of the Utah Supreme Court is supported by the definition of a "lien obtainable by legal or equitable proceedings" given in §60a(4), 11 U.S.C. §96a(4):

> A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) is a lien arising in the ordinary course of such proceeding upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given special priority over other liens which are prior in time.

This definition makes it clear that a lien, to be superior to the transfer involved here, must be obtained by judicial process. It does not include liens given special priority or consensual

liens. The credit union here had obtained a judgment and had executed such judgment upon the Bronco, with possession being delivered to it before it had notice of insolvency. At that time, no one could have obtained a judgment on the Bronco superior to the credit union unless given special priority, which lien would then not be included within the definition of §60a(4), 11 U.S.C. §96a(4). Neither could anyone have levied on the property as it was in possession of the credit union awaiting sale. Therefore, as in McIntosh, the "transfer" was completed at the time the property was attached, or as in this case, executed upon, and delivered.

ORDER

Pursuant to the findings expressed in the foregoing memorandum decision,

IT IS ORDERED that judgment be entered to the effect that plaintiff, the trustee in this case, take nothing, and that this action be dismissed on the merits. Each side shall bear its own costs.

DATED this 6 day of November, 1979.

BY THE COURT

Ralph R. Mabey
United States Bankruptcy Judge

RRM/bl